No. 19-7

IN THE

Supreme Court of the United States

SEILA LAW LLC,
Petitioner,
v.

CONSUMER FINANCIAL PROTECTION BUREAU.
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF MAIN STREET ALLIANCE AS AMICUS CURIAE IN SUPPORT OF COURT-APPOINTED AMICUS CURIAE

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STATEMENT OF INTEREST[1]

Main Street Alliance ("Main Street") is a national network of state-based small-business coalitions that provides its members with a platform to express views on issues affecting their businesses and local economies. Main Street has affiliates in 12 states. Its work encompasses a broad range of issues affecting the business community, including matters relating to access to capital and equal opportunities for wealth building. Main Street's members include approximately 30,000 small businesses across the country.

Main Street's members' experiences confirm that the Consumer Financial Protection Bureau ("CFPB") is vitally important to consumers and small businesses alike. Small businesses face many of the same financial challenges as do consumers, and benefit from the CFPB's ability to efficiently take action to curb predatory or discriminatory financial activity – without the overhanging threat of politically-driven interference. The resolution of the questions presented is of great importance to small businesses because effective consumer financial protection ensures that large and small businesses operate on an equal, transparent playing field. That goal is only possible, however, if regulation of the evolving, complex consumer finance

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[1] No counsel for a party authored any part of this brief. Only Amicus and its attorneys paid for the filing and submission of this brief. Pursuant to Supreme Court Rule 37.3(a), all parties consented to the filing of this brief.

market remains independent from political influence.

SUMMARY OF THE ARGUMENT

Small businesses are a central pillar of the nation's economy, employing tens of millions of Americans, and making outsized contributions to innovation and local economies. Like larger firms, small businesses need stability, transparency, and predictability in order to thrive. But, unlike large businesses, small ones face many of the same financial challenges as do consumers, and benefit from effective consumer financial regulation.

Changing the leadership structure of the CFPB would not only contravene well-established precedent, it would fundamentally undermine the agency's work protecting the small business community. Small businesses require fair and equitable access to personal financing, consumer confidence, and transparency to thrive. To date, the CFPB has worked to advance the same interests. Changing the present CFPB leadership structure, however, would introduce unpredictability, instability, and politicization into the agency and the consumer finance market at large, ultimately harming small businesses and their owners. Amicus therefore respectfully asks this Court to affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

ARGUMENT

I. SMALL BUSINESSES ARE CRITICAL TO THE NATION'S ECONOMY.

Small businesses[2] employ nearly half of the country's private sector workforce (more than 58 million people). *See* U.S. Small. Bus. Admin., 2018 Small Business Profile (2018), https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-US.pdf. They contribute at least as much as large firms to net job growth. *See* U.S. Small Bus. Admin., Small Business Bulletin, Small Business Market Update (June 2015), https://www.sba.gov/sites/default/files/Small_business_bulletin_June_2015.pdf. And small firms drive innovation, employing more than 40 percent of high-tech workers in the U.S. and producing 13 times as many patents per employee than larger firms. *See* Karen Mills & Brayden McCarthy, *The State of Small Business Lending: Credit Access During the Recovery and How Technology May Change the Game* 10 (Harvard Bus. Sch. Working Paper, No. 15-004, July 22, 2014), http://www.hbs.edu/faculty/Publication%20Files/15-004_09b1bf8b-eb2a-4e63-9c4e-0374f770856f.pdf.

Small, independent businesses also create investment in their local communities. They are

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[2] The U.S. Small Business Administration Office of Advocacy defines a small business as an independent business having fewer than 500 employees. *See* U.S. Small Bus. Admin., Frequently Asked Questions About Small Business (Aug. 2018), https://www.sba.gov/sites/default/files/advocacy/Frequently-Asked-Questions-Small-Business-2018.pdf.

more likely, for example, to buy goods and services from local sources, hire local employees, and pay taxes to local and municipal governments. This creates a "virtuous cycle of local spending" that results in more tax revenue, more jobs for residents, and more investments in infrastructure and education. American Booksellers Association & Civic Economics, *Indie Impact Study Series: Las Vegas, New Mexico*, Las Vegas First Independent Business Alliance (Summer 2012), http://www.lvfiba.org/Las_Vegas_Client_120717.pdf.

Not surprisingly, compared to the effect of larger firms, communities with thriving small businesses report stronger local economies characterized by higher income growth, lower levels of poverty, and more employee retention during economic downturns. *See* Giuseppe Moscarini & Fabien Postel-Vinay, *The Contribution of Large and Small Employers to Job Creation in Times of High and Low Employment*, 102 Am. Econ. Rev. 2509 (Oct. 2012); Anil Rupasingha, *Locally Owned: Do Local Business Ownership and Size Matter for Local Economic Well-Being?* (Fed. Reserve Bank of Atl., Working Paper No. 01-13, 2013), https://www.frbatlanta.org/-/media/Documents/community-development/publications/discussion-papers/2013/01-do-local-business-ownership-size-matter-for-local-economic-well-being-2013-08-19.pdf.

II. SMALL BUSINESSES FACE THE SAME FINANCIAL CHALLENGES AS CONSUMERS.

A. Small businesses, particularly minority- and woman-owned ones, face barriers in accessing credit.

Like consumers, small businesses struggle with access to credit. The denial of quality financing can devastate even healthy small businesses. Those running on tight margins and with little cushion cannot always weather a storm.

This is a problem in particular for minority-owned businesses. Research indicates that, for minority-owned small businesses, loan approval rates are lower, loan sizes are smaller, and interest rates are higher. *See* Jared Weitz, *Why Minorities Have So Much Trouble Accessing Small Business Loans*, Forbes (Jan. 22, 2018, 9:00 AM), https://www.forbes.com/sites/forbesfinancecouncil/2018/01/22/why-minorities-have-so-much-trouble-accessing-small-business-loans/#1b05463355c4; Robert W. Fairlie & Alicia M. Robb, U.S. Dep't of Commerce, *Disparities in Capital Access Between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs* 3 (Jan. 2010), https://www.mbda.gov/sites/mbda.gov/files/migrated/files-attachments/DisparitiesinCapitalAccessReport.pdf. Similarly, approval rates for women-owned firms are 15 to 20 percent lower than for male-owned firms. *See* Josh Silver, *Small Business Loan Data: Recommendations to the Consumer Financial Protection Bureau for Implementing Section 1071 of* *the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*, Nat'l Cmty. Reinvestment Coal. 15 (2014) https://ncrc.org/wp-content/uploads/2014/08/recommendations-to-cfpb-on-small-business-loan-data.pdf.

These findings are echoed by the experiences of Main Street Alliance members, who report that banks expect credit and sales history they simply do not have. Many members report discrimination when seeking commercial loans. For example, one longtime Main Street member, a black woman with a long history of entrepreneurship, was repeatedly denied loans for operating capital to launch her retail business, despite a credit score of 700 and longstanding relationships with the banks where she had applied. Though her business became very successful, the lack of financing prevented her from growing it as she had planned, and she finally had to convert it into a franchise company.[3] One of her franchisees, who is white, quickly obtained financing in amounts that she had been denied.[4]

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[3] Subsequently, the woman joined a lawsuit filed in May 2019 alleging that the CFPB had failed to issue regulations implementing Section 1071 of the Dodd- Frank Act, 15 U.S.C. § 1691c-2, which requires financial institutions to collect, maintain, and publish records of their actions on loan applications by woman-owned, minority-owned, and small businesses. The lawsuit highlights the scope of the CFBP's authority to protect historically underserved groups in the small business community – and the necessity for the CFPB to do more.

[4] Another member who experienced lack of access was a white woman who recently developed a growth plan for her

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These suspicions are supported by recent testing studies, such as one conducted by the National Community Reinvestment Coalition, which found that bank staff introduce themselves more frequently to white customers than to Black or Latinx customers, provide white customers with "significantly better" information about business loans, and request more documentation from Black and Latinx customers. Amber Lee et al., *Disinvestment, Discouragement and Inequity in Small Business Lending*, Nat'l Cmty. Reinvestment Coal. 5, https://ncrc.org/wp-content/uploads/2019/09/NCRC-Small-Business-Research-FINAL.pdf.

With limited access to the standard capital market, small business owners turn to alternative lenders. Research by the Opportunity Fund into a dataset of alternative loans held by small business owners found that:

- The average loan carried an APR of 94%, with one loan priced at an astounding 358% APR.

- The average monthly loan payment was nearly double the net income available to the business owners.

Footnote continued from previous page
successful, four employee printing company and approached her bank for a $30,000 loan. The bank denied her application citing "insufficient cash flow" and, when pressed, stated they were no longer lending to small businesses.

- Among Hispanic borrowers, the average monthly payment was more than 400% of take-home pay.

See Eric Weaver et al., *Unaffordable and Unsustainable: The New Business Lending on Main Street*, Opportunity Fund (May 2016), https://www.opportunityfund.org/wp-content/uploads/2019/09/Unaffordable-and-Unsustainable-The-New-Business-Lending-on-Main-Street_Opportunity-Fund-Research-Report_May-2016.pdf.

B. Small businesses are harmed by abusive lending practices.

Small businesses sometimes need to turn to alternative finance companies to fill the gaps identified above. And when a small business owner is scrambling to make payroll, pay a supplier, or cover rent, alternative financing may appear to offer a quick way out. Without effective regulation, however, the impact on the economy can be devastating. Often these types of loans come with hidden, onerous, or abusive terms that may not be comprehensible to typical borrowers. *See* Lenore Palladino, *Small Business Fintech Lending: The Need for Comprehensive Regulation*, 24 Fordham J. of Corporate & Fin. L. 77, 89 (2018).

One particularly harmful practice is the use of confessions of judgment by the merchant cash advance ("MCA") industry. *See* Zachary Mider & Zeke Faux, *I Hereby Confess Judgment*, Bloomberg Businessweek (Nov. 20, 2018) ,https://www.bloomberg.com/graphics/2018-confessions-of-judgment/?srnd=confessions-of-judgment. In the aftermath of the financial crisis, banks cut back on lending to small businesses, enabling the rise of alternative lenders calling their products “merchant cash advances” to evade lending regulations. *Id.* The MCA industry grew quickly, extending around $15 billion in credit in 2017. *Id.*

When unable to access traditional credit for pressing needs, small businesses often turn to predatory lenders, who routinely include confessions of judgment in their loan application. *Id.* To secure desperately needed capital, small business owners must “sign a statement giving up their right to defend themselves if a lender takes them to court.” *Id.* This results in adverse judgments, frozen bank accounts, and seized assets. *Id.*

The abuses described in a 2018 Bloomberg investigative report are both remarkable and deeply troubling. One owner of a real estate agency described his experience. *Id.* When he needed additional funding, he turned to an MCA. *Id.* Despite the owner making scheduled payments in his loan, the MCA filed a court judgment against him, froze his accounts, and stripped his payments. *Id.* He eventually lost the business and his retirement savings. *Id.*

Main Street has also received reports of companies that provide products and services to small businesses inserting auto-renew clauses in contracts, piling debt onto small business owners, and demanding lump-sum payments before sending small businesses to collection agencies.

C. Small businesses depend on the integrity of the consumer financial markets because small businesses draw on personal wealth and creditworthiness.

Consumer financial protections are critical to small businesses because small business owners often draw on their personal finances to fund their businesses. As one study found, nearly two-thirds of new businesses used the owner's personal or family savings as startup capital. *See Access to Capital for Entrepreneurs*, Kauffman Foundation 5 (2019), https://www.kauffman.org/-/media/kauffman_org/entrepreneurship-landing-page/capital-access/capital report_042519.pdf. Another report echoed that conclusion, finding that "the majority of all small business loans have personal commitments," and that "personal wealth, primarily through home ownership, decreases the probability of loan denials among existing business owners." Robert W. Fairlie, *Immigrant Entrepreneurs and Small Business Owners, and their Access to Financial Capital*, U.S. Small Bus. Admin. 15 (May 2012), https://www.sba.gov/sites/default/files/rs396tot.pdf. Importantly, personal funding does not stop after the initial startup phase: it is an ongoing challenge for small business owners. A 2017 analysis found that "[f]inancing is a constant need for businesses to stay open and grow" and that "[o]ver half of businesses [53%] report receiving additional funding from their owners." Michael J. McManus, *Dissecting Access to Capital*, U.S. Small Bus. Admin. (Sept. 2017), https:

//advocacy.sba.gov/2017/09/01/dissecting-access-to-capital.[5]

To that end, the CFPB has created important and long overdue protections in three areas that affect small business financing: credit cards, mortgages, and student loans. Given small business owners' reliance on credit cards, it is particularly important that the credit card market be properly regulated. Personal credit cards are one of the top three sources of short-term capital used by small business owners, and entrepreneurs use personal credit cards more frequently than business credit cards. *See* Kauffman Foundation, *supra*, at 5; U.S. Small Bus. Admin., *Small Business Finance Frequently Asked Questions* (July 2016), https://www.sba.gov/sites/default/files/Finance-FAQ-

[5] Use of personal capital by small business owners, however, leaves them particularly vulnerable. Non-bank lending to individual borrowers is covered by consumer protection laws, but non-bank lending to small businesses is not – despite the fact that over half of small-employer firms with debt use a personal guarantee to secure that debt. Fed Small Bus., *2019 Small Business Credit Survey* 3 (2019), https://www.fedsmallbusiness.org/medialibrary/fedsmallbusiness/files/2019/sbcs-employer-firms-report.pdf. Other regulatory gaps include cyber-fraud. When cyber-fraud hits an individual person's bank account, the Electronic Funds Transfer Act, 15 U.S.C. § 1693 *et seq*., requires banks to bear the risk and reimburse customers for the loss. Not so for small business customers. *See* John Ydstie, *When Cyberfraud Hits Businesses, Banks May Not Offer Protection*, NPR (Sept. 15, 2015), https://www.npr.org/sections/alltechconsidered/2015/09/15/440252972/when-cyber-fraud-hits-businesses-banks-may-not-offer-protection.

2016_WEB.pdf [hereinafter "Finance FAQs"]. The CFPB is charged with implementing the 2009 Credit Card Accountability Responsibility and Disclosure Act, which, among other things, limits how credit card companies can charge consumers fees, reduces credit card penalty fees, and makes the cost of credit cards more transparent to consumers. These protections are particularly important for small business owners, who often face liquidity and cash flow issues that can lead to exorbitant credit card fees and penalties. The CFPB also issued a final regulation on credit cards, which requires consideration of a consumer's ability to pay in issuing credit cards.

Regulation of the mortgage market also falls primarily in the CFPB's jurisdiction. The CFPB's authority includes home equity lines of credit, which are products that small business owners often use for financing purposes. The CFPB also has supervisory and enforcement authority to address predatory practices and discrimination in the housing and lending market. Additionally, pursuant to the Home Mortgage Disclosure Act, the CFPB maintains a database containing the most comprehensive publicly available information on mortgage market activity, including a dataset of nationwide lending activity that indicates the number and dollar amounts of loan applications, cross-tabulated by loan, borrower, and geographic characteristics. *See HMDA Data Publication*, CFPB, https://ffiec.cfpb.gov/data-publication (last visited Jan. 17, 2020). This data allows financial institutions, policymakers, and nonprofit organizations to identify and eradicate discriminatory practices in the home mortgage market, and allows the many small business owners reliant on home equity to more effectively seek financing and negotiate with financial institutions.

An often overlooked challenge facing small business owners is student loan debt – another financial instrument that falls within the CFPB's jurisdiction. In a 2015 working paper, the Federal Reserve Bank of Philadelphia found that more educated people were, counterintuitively, *less* likely to receive business funding because of student loan debt. Brent W. Ambrose et al., *The Impact of Student Loan Debt on Small Business Formation* (Fed. Reserve Bank of Phil., Working Paper No. 15-26, 2015), https://www.philadelphiafed.org/research-and-data/publications/working-papers/2015. "Given the importance of an entrepreneur's personal debt capacity in financing a start-up business, personal debt that is incurred early in life and that restricts a person's ability to take on future debt can have profound implications for the growth in small businesses," the report noted. *Id.* at 1. The CFPB plays a critical role in supervising and enforcing regulations surrounding student debt.

Personal capital is especially important for minority business founders. One report identified lack of access to personal capital as one of the barriers leading to lower rates of business ownership among Latinos and African-Americans. *See* Joyce A. Klein, *Bridging the Divide: How Business Ownership Can Help Close the Racial Wealth Gap*, Aspen Institute 10 (January 2017); *see also* Alicia Robb, *Access to Capital Among Young Firms, Minority-Owned Firms, and High-Tech Firms*, U.S. Small Bus. Admin. 2 (April 2013), https://www.sba.gov/sites/default/files/files/rs403tot(2).pdf (reporting that "firms owned by African Americans and Latinos . . . rely[] disproportionately upon owner equity investments"). The CFPB's regulation of credit cards and mortgages is a particularly critical guardrail for minority small business owners. Minority entrepreneurs are far less likely to use bank loans to start their businesses, and instead rely disproportionately on personal credit cards. Finance FAQs, *supra* at 3. Mortgage regulations are also critically important for small business owners. Homes constitute the majority of personal wealth for most Americans, including minorities, and are often the only asset they can leverage for startup capital. But a recent analysis of nearly 7 million 30-year mortgages by researchers at the University of California at Berkeley found that African American and Latinx applicants were charged higher interest rates and heavier refinance fees when compared with white borrowers with comparable credit scores. Robert Bartlett et al., *Consumer-Lending Discrimination in the FinTech Era*, Univ. of Cal. at Berkeley (November 2019), https://faculty.haas.berkeley.edu/morse/research/papers/discrim.pdf.

These disparities are harmful to the overall economy; for example, U.S.-born Latino entrepreneurs "make important contributions to the economy, generating $26 billion in business income." Robert W. Fairlie, *Latino Business Ownership: Contributions and Barriers for U.S.-born and Immigrant Latino Entrepreneurs*, U.S. Small Bus. Admin. 2 (January 2018), https://www.sba.gov/sites/

default/files/Latino-Business-Ownership-Research-Paper_.pdf. Yet their contributions could be greater still—"[t]he two most important factors limiting business ownership among U.S.-born Latinos are their relatively young age and wealth." *Id.*

Women-owned businesses too are unusually dependent upon personal wealth for capitalization. Among "firms that do access capital at startup, women entrepreneurs tend to rely more heavily on personal sources of capital, such as savings accounts or loans from family members." Premier Quantitative Consulting, Inc., *Research on Undercapitalization as a Contributor to Business Failure for Women Entrepeneurs*, Nat'l Women's Bus. Council 1 (2015), https://cdn.www.nwbc.gov/wp-content/uploads/2018/02/13132628/Undercapitalization-as-a-Contributor-to-Business-Failure-for-Women-Entpreneurs.pdf; *see also* Robb, *supra* at 3 ("Women-owned businesses['] reliance upon outside equity capital is particularly low."). Additionally, women are disproportionately affected by the difficulty of accessing capital with student loan debt. Women earn approximately 56 percent of all bachelor's degrees in the United States, but hold nearly two-thirds of outstanding student debt and take on average two years longer than males to pay off the debt. American Association of University Women, *Deeper in Debt: Women and Student Loans* 2 (2017). These challenges compound an already challenging entrepreneurship environment for women: even though women owned approximately 40% of all businesses in 2018, female founders received only 2.2% of total venture capital dollars. National Women's Bus. Council, *The 2019 Annual Report* 17

(2019); American Express, *The 2018 State of Women Owned Businesses Report* (2018). This is significant for the national economy – if "capital differences facing women entrepreneurs at startup did not exist," the economy would generate millions of additional jobs. Premier Quantitative Consulting, *supra* at 1 (estimating 6 million additional jobs in the five-year period starting in 2015).

III. THE CFPB HAS TAKEN ACTIONS TO PROTECT SMALL BUSINESSES AND HAS THE AUTHORITY TO TAKE MORE.

As discussed above, by acting to level the playing field for consumers, the CFPB protects small businesses as well. But the CFPB has also acted in ways that benefit small businesses directly, and has the statutory authority to expand its scope of activity in the future.

For example, the CFPB shares jurisdiction over small business lending. *See* CFPB, Supervisory Highlights 12 (Summer 2018), https://files.consumerfinance.gov/f/documents/bcfp_supervisory-highlights_issue-17_2018-09.pdf. It has done important work studying small business lending and calling attention to the degree to which a properly regulated lending market supports the growth of small business and the many jobs that they create. *See* CFPB, Key Dimensions of the Small Business Lending Landscape (May 2017), https://files.consumerfinance.gov/f/documents/201705_cfpb_Key-Dimensions-Small-Business-Lending-Landscape.pdf. Critically, the CFPB:

- Implemented the Equal Credit Opportunity Act, which prohibits discrimination in business lending.

- Provided new data detailing the demand for and supply of small-business credit.

- Created the Office of Fair Lending within the Division of Supervision, Enforcement, & Fair Lending, which monitors compliance with federal consumer financial laws by supervising institutional lending practices and, if necessary, communicates recommendations to the institution, launches formal investigations, or initiates enforcement actions.

- Works to ensure that consumer credit histories are as accurate as possible, which helps startups considerably because new business owners frequently rely on their personal credit histories to apply for their first business loan.

- Uses its supervisory and enforcement authority to curb predatory lending practices market-wide. CFPB's supervisory and enforcement actions, even those not targeted at small business lenders, benefit small business owners because many lending institutions engage in both business and personal lending. Actions taken by the CFPB therefore create a deterrent effect against all abusive practices. Additionally, due to small business owners' reliance on personal

> financial products, the CFPB's actions to curb abusive consumer lending practices also protect small businesses.

See Open for Business: The Impact of the CFPB on Small Business: Hearing Before the H. Subcomm. on Investigations, Oversight, and Regulations, 112th Cong. 1 (2011).

The CFPB has also consistently emphasized the importance of listening to and protecting the small business community, including through field hearings, *see* CFPB, Field Hearing About Small Business Lending in Los Angeles (May, 10, 2017), https://www.consumerfinance.gov/about-us/events/archive-past-events/field-hearing-about-small-business-lending-los-angeles-ca, and its own procurement practices, *see* Minority, Women, and Small-Owned Businesses, CFPB, https://www.consumerfinance.gov/about-us/doing-business-with-us/small-minority-businesses.

The CFPB also has untapped authority to further protect small businesses. For example, Section 1071 of the Dodd-Frank Act, 15 U.S.C. § 1691c-2, requires financial institutions to maintain records of their actions on loan applications by women-owned, minority-owned, and small businesses, and requires the CFPB to collect and publish this data annually, and to issue rules and guidance to effectuate the section. This data would help identify trends and gaps related to credit access for small businesses. The CFPB has not yet fulfilled its Section 1071 responsibilities, but when it does, small business owners will have access to information critical to effectively seek out and negotiate financing. *See* CFPB, Key Dimensions, *supra*, at 39.

The reality that small businesses benefit from effective financial regulation is reflected in the attitudes among small business owners: one recent poll showed that 80% of small business owners believe regulation is needed in a modern economy, with three in four supporting the CFPB. *See* Small Business Majority, *Small Business Owners Say Commonsense Regulations Needed to Ensure a Modern, Competitive Economy* (May 22, 2018), https://smallbusinessmajority.org/our-research/government-accountability/small-business-owners-say-commonsense-regulations-needed-ensure-modern-competitive-economy . And when asked to rank problems facing their business, owners put the burden of federal regulation only eighth. *Id.*

IV. THE CFPB MUST REMAIN STABLE AND POLITICALLY INDEPENDENT TO EFFECTIVELY PROTECT SMALL BUSINESSES.

The CFPB's critical work protecting consumers and small businesses depends on the agency's independence and stability. As the D.C. Circuit observed:

> Congress has historically given a modicum of independence to financial regulators . . . . That independence shields the nation's economy from manipulation or self-dealing by political incumbents and enables such agencies

> to pursue the general public interest in the nation's longer-term economic stability and success, even where doing so might require action that is politically unpopular in the short term.

PHH Corp. v. CFPB, 881 F.3d 75 (D.C. Cir. 2018) (en banc).

Consistent with this principle and historical precedent, Congress provided for a single CFPB director to serve a fixed term and only be terminated by the President for cause. In deliberately insulating the CFPB director from political influence, "Congress sought to promote stability and confidence in the country's financial system," and, in so doing, "imbue[d] the agency with the requisite initiative and decisiveness to do the job of monitoring and restraining abusive or excessively risky practices in the fast-changing world of consumer finance." *Id.*

The concerns underlying Congress's decision to imbue the CFPB director with political independence were well-founded. The phenomenon of "midnight" regulations – the fast-tracking of regulations at the end of an administration – is well-documented. *See* Anne Joseph O'Connell, *Agency Rulemaking and Political Transition*, 105 Northwestern L. Rev., 471, 472 (2011) [hereinafter "Agency Rulemaking"]. Equally common are "abandoned regulatory actions" – efforts by a new administration, by any means necessary, to discard regulations that were not completely finalized by a prior administration.[6] *Id.* at 509. These fixtures of political transition would be devastating in the consumer finance context, where market confidence and predictability have proven indispensable.

Vacancies in agency leadership present another source of instability. Anne Joseph O'Connell, an expert in administrative law and federal bureaucracy from Stanford Law School, has observed that "[v]acancies, particularly if frequent and lengthy, may have detrimental consequences for the modern administrative state." Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Positions*, 82 S. Cal. L. Rev. 913, 913 (2009) [hereinafter "Vacant Offices"]. O'Connell further notes that, "filling these top-level positions in the federal administrative state is cumbersome, inconsistent, and at times controversial. . . . Appointee tenure is short, leading to many new openings a year or two later. Then agency officials flee government service near the end of an administration." *Id.* at 915. Empirical data confirms O'Connell's observations: as of January 19, 2020 – more than three years after President Donald J. Trump's inauguration – of 741 key executive positions requiring Senate approval, approximately 31 percent have not been confirmed, and 23 percent have not been nominated. *Tracking How Many Key Positions Trump Has Filled So Far*, The Wash. Post

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[6] These efforts include withdrawal of regulations that were sent to the Federal Register but had not been published, or suspension of the effective dates of rules that had been published but had not yet gone into effect. Agency Rulemaking, *supra* at 509.

(Jan. 13, 2020, 10:15 AM) , https://www.washingtonpost.com/graphics/politics/trump-administration-appointee-tracker/database/ (last visited Jan. 19, 2020). The vacancies include three Cabinet-level officials, including the Department of Homeland Security and the Director of National Intelligence. Although the number of current vacancies is unusually high, this issue transcends any particular administration. A study of executive agency vacancies from President Carter to President George W. Bush found that Senate-confirmed positions lacked a permanent director on average one-quarter of the time. *See* Vacant Offices, *supra* at 918.[7] These vacancies "contribute to agency inaction, foster confusion among nonpolitical employees, and undermine agency legitimacy." *Id.* at 913.

Small businesses – particularly woman- and minority-owned small businesses – would be particularly harmed by politicization or instability at the CFPB. As discussed, small businesses typically operate on razor-thin margins and rely heavily on personal finance. A stable and predictable environment for obtaining financing and a healthy and confident consumer market are therefore critical to the well-being of the small business community. Conversely, abrupt changes in the priorities,

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[7] More recently, during the third-year of the Obama administration, Cabinet-level positions were vacant for a cumulative total of 288 days, and during the third-year of the Clinton administration they were open for 322 days. Andrew Witherspoon, *Trump's incredibly empty Cabinet*, Axios, (June 6, 2019), https://www.axios.com/trump-cabinet-vacancies-65a66f00-a140-4b49-887f-3c1bcf6469a7.html.

protections, and initiatives of the CFPB will disproportionately affect those with little financial cushion. This is compounded by the fact that only 50% of businesses survive for five years – even brief transitional periods or market uncertainty can doom a fledgling business. Such instability would be virtually unavoidable if the CFPB's leadership structure were changed.

CONCLUSION

Amicus respectfully stresses that the CFPB serves a vital and important purpose for small businesses, and changing the present leadership structure of the CFPB would fundamentally undermine the agency's work. It therefore asks this Court to affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

January 22, 2020

Respectfully submitted,

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